In the Supreme Court of the United States

OCTOBER TERM, 1904.

SWIFT AND COMPANY ET AL., APPELLANTS,
v.
THE UNITED STATES. } No. 103.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This case was begun in the circuit court of the United States for the northern district of Illinois by a petition in equity, filed in pursuance of section 4 of the so-called anti-trust act of July 2, 1890 (26 Stat. L., 209), for the purpose of preventing and restraining the defendants below from violating the provisions of that act, the parts of which material to the issues in this suit read as follows:

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed

guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several States or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

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SEC. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

The petition alleges that the defendants are engaged in the business of buying live stock, namely, cattle, sheep, and hogs, at various stock yards and competitive markets throughout the United States, and slaughtering and converting the same into fresh meats at plants maintained for that purpose in Nebraska, Missouri, Iowa, Minnesota, Wisconsin, Indiana, and Illinois; that they are also engaged in the business of selling such fresh meats, at the places where so prepared, to dealers and consumers in States other than where so prepared and sold, and in the Territories and in the District of Columbia and in foreign countries, and in shipping such meats, when so sold, from the places where prepared, over lines of transportation, to such dealers and consumers, pursuant to such sales; that they are also engaged in the business of shipping such fresh meats from the places where so prepared, over lines of transportation, to their agents located at or near the principal markets for such meats in other States than where prepared and in the Territories and the District of Columbia and foreign countries, and there selling the same through such agents to dealers and consumers; that of the total volume of trade and commerce in fresh meats among the several States and Territories and the District of Columbia, the defendants together control about 60 per cent, and that as to the trade and commerce in fresh meats among the several States and Territories and the District of Columbia and with foreign nations, the defendants should, and but for the acts complained of would, be and remain in free and

unrestrained competition with each other. The petition then states the facts constituting the gravamen of the action, to wit:

> Sixth. That the said defendants, in violation of the provisions of an act of Congress approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," and in order to restrain competition among themselves (which would otherwise exist) as to the purchase of live stock necessary to the production of the meats produced by them, have engaged in and intend to continue an unlawful combination and conspiracy between themselves for directing and requiring their respective purchasing agents at the said several stock yards and open and competitive markets where they customarily purchase such live stock, to wit, Kansas City and St. Joseph, Mo.; Omaha, Nebr.; Sioux City, Iowa; St. Paul, Minn.; East St. Louis and Chicago, Ill., aforesaid (the same being live stock produced and owned principally in other States and Territories of the United States, and shipped by the owners thereof to such stock yards and open markets for competitive sale to persons and corporations engaged in producing and dealing in fresh meats in the manner aforesaid), to refrain from bidding against each other, except perfunctorily and without good faith, when making purchases of such live stock on behalf of the said defendants, respectively, and by this means inducing and compelling such owners of such live stock to part with the same at such stock yards and open markets at prices less than they

would there receive if such bidding were really competitive as between the said purchasing agents of the said defendants; and the said defendants have caused and are causing their agents, respectively, to refrain from bidding accordingly, and have induced and are inducing each other and will, unless restrained by this honorable court, continue, in pursuance of such conspiracy, to induce each other to refrain from bidding as aforesaid, which aforesaid combination and conspiracy is one in restraint of trade and commerce among the several States and Territories of the said United States and the District of Columbia and with foreign countries.

Seventh. That the said defendants, in further violation of the provisions of the said act of Congress approved July 2, 1890, and in order to further restrain competition among themselves, which would otherwise exist, as to the purchase of live stock necessary to the production of the meats produced by them, and to obtain for themselves and each other undue advantage over the owners and shippers thereof in the buying of the same at the said several stock yards and open markets, have engaged in and intend to continue an unlawful combination and conspiracy among themselves for bidding up, through their respective purchasing agents, the prices of live stock for a few days at a time at the said stock yards and open markets, so that the market reports will show prices much higher than the state of the trade will warrant, and thereby inducing owners of such live stock in divers other of the said States and Territories

to simultaneously make large shipments of such live stock from such other States and Territories to such stock yards and open markets, instead of shipping the same to more natural and advantageous markets and at more natural and advantageous times in the due and proper course of such trade and business, and by this means and by reason of the resulting large offerings there of such live stock (and by thereupon refraining from bidding against each other for the same), obtaining such live stock at prices much less than it would bring in the regular way of trade if such combination and conspiracy were not so engaged in and continued, and have been and are now from time to time through their said agents so fraudulently bidding up the prices of such stock, and will, unless restrained by this honorable court, continue to do so; which said combination and conspiracy last aforesaid is also one in restraint of trade and commerce among the several States and Territories of the said United States and the District of Columbia and with foreign countries.

Eighth. That the said defendants, in violation of the provisions of the act of Congress of the said United States, approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," and in order to restrain and destroy competition among themselves as to such trade and commerce, and monopolize such trade and commerce, have engaged in and intend to continue an unlawful combination and conspiracy to arbitrarily from time to time raise,

lower, and fix prices, and to maintain uniform prices at which they will sell, directly or through their respective agents, such fresh meats to dealers and consumers throughout the said States and Territories and the District of Columbia and foreign countries; and that the arbitrary raising, lowering, fixing, and maintaining of such prices, in pursuance of the said combination and conspiracy, is being and is to be effected through the action of divers of their agents and attorneys to your petitioner unknown, in secretly holding periodical meetings at some place or places to your petitioner unknown, and there agreeing upon the prices to be adopted by the said defendants, respectively, in such trade and commerce, to be enforced by them until at a subsequent meeting the same may be changed; which said prices are notified by letters and telegrams, in plain language and divers codes and ciphers; and they have been and are maintained by said defendants by adhering to the same in their sales made directly, and, among other ways, by collusively restricting and curtailing the quantities of such meats shipped by them in such trade and commerce to the markets aforesaid, whenever necessary or conducive to the maintaining of the prices so fixed; by imposing against each other divers penalties for any and all deviations by the said defendants or any of them from the prices so fixed; by establishing a uniform rule for the giving of credits to dealers throughout the said States and Territories and District of Columbia and foreign countries, and for the conduct of

the business of such dealers, with penalties as between the said defendants for violations thereof; by notifying each other of the delinquencies of the said dealers, and keeping what is commonly known as a "black list" of such delinquents, and refusing to sell such meats to any of such delinquents; which said combination and conspiracy above set forth is one in restraint and monopoly of commerce among the several States and Territories of the said United States and the District of Columbia and with foreign countries.

Ninth. And the said defendants, in violation of the provisions of the said act of Congress approved July 2, 1890, have engaged in and intend to continue an unlawful combination and conspiracy to direct and require their respective agents at and near many of the markets for such fresh meats throughout the said several States and Territories and the District of Columbia to arbitrarily make and impose uniform charges for cartage for the delivery, upon making sales to dealers and consumers in those markets, of the meats shipped to them through the said agents by the said defendants, respectively, from their said several points of preparation of the same, when no such charges have been or are customary in such trade and commerce, or would be made but for said combination and conspiracy, thereby increasing the charges for such meats to said dealers and consumers in such markets and preventing the purchase of the same by those who are unable or unwilling to pay more than the price of the

meats themselves without such additional charge; which said combination is also in restraint of such trade and commerce aforesaid.

Tenth. That notwithstanding the common carriers by railroad subject to the provisions of the laws of the United States for the regulation of commerce have established and published, and do now and will establish and publish, respectively, their schedules of rates, fares, and charges for the transportation of live stock to the places of its conversion into such meats as aforesaid, and for the transportation of such meats as aforesaid, and notwithstanding such rates were, and are, and will be the only rates for the transportation as aforesaid of such articles, the said defendants, intending thereby to monopolize and attempt to monopolize the commerce aforesaid and prevent competition therein, have all and each engaged in and will continue arrangements and agreements with divers officers and agents of such common carriers, whereby said defendants were to receive and have received and will continue to receive, by means of rebates and other devices, unlawful rates for such transportation, much less than the said lawful rates, and were to exclusively enjoy and share said unlawful advantage to the exclusion of competitors and would-be competitors and the general public, and have accordingly so enjoyed and shared them, and will, unless restrained by this honorable court, continue to do so; and by force of the consequent inability of competitors and would-be competitors to engage or continue in such commerce without ruinous

> loss have monopolized and are monopolizing and will continue to monopolize the said commerce, and have attempted and are attempting and will attempt to monopolize such commerce in live stock and fresh meats among the States and Territories and the District of Columbia and with foreign countries; which scheme to monopolize is also a combination and conspiracy in restraint of trade and commerce among the States and Territories and the District of Columbia and with foreign countries.

Then follows the prayer for relief, namely, that the defendants and their agents be enjoined "from continuing each and any of the unlawful proceedings aforesaid, and from attempting to monopolize, in the manner aforesaid, or in any other manner, and by any other means and devices, the commerce aforesaid, or any part thereof, or any part of the trade or commerce among the States and Territories and District of Columbia, and with foreign nations, and especially from refraining and instructing their respective purchasing agents to refrain from bidding against each other, except perfunctorily and without good faith, in making purchases of live stock, and from inducing each other to so refrain, and from engaging in any combination or conspiracy, understanding, or arrangement, for the purpose of bringing about such refraining from competitive bidding, and from bidding up the prices of live stock at the stock yards and open markets higher than the state of the trade will warrant, and from arbitrarily raising, lowering, fixing, and maintaining prices of their and each other's products,

and from maintaining prices so fixed and uniform prices by adhering to the same in their sales, or by restricting the quantities of meats shipped, or by imposing penalties upon themselves and each other, or by making uniform rules for credits to dealers, or by making and keeping what is commonly known as a 'blacklist' of delinquent dealers, or by refusing to sell meats to such delinquents, or by any other method or device; and from agreeing with each other and acting in concert, with a view to fixing prices or terms for the sale or delivery of said meat products so sold, in such manner as to prevent free competition in, and restrain or monopolize, such commerce; and that they be enjoined from imposing a charge for cartage for the delivery of their products upon making sales to dealers and consumers; and from asking and receiving, by means of rebates or otherwise, from railroad companies less than the established and published rates for the transportation of their live stock and meat products."

The petition also prayed "discovery of the books, papers, accounts, letters, telegrams, records, and documents whatsoever of the defendants relating in any manner, directly or indirectly, to the purchase or shipment of live stock by them or their agents, or to the sale or shipment or delivery of fresh meats by them or their agents."

The defendants demurred to the petition on the following grounds:

> (1) The bill of complaint does not allege any contract, combination, or conspiracy in restraint of interstate or foreign trade or commerce

within the meaning of said act of Congress of July 2, 1890.

(2) The bill of complaint does not allege any acts of defendants monopolizing or attempting to monopolize, or combining or conspiring to monopolize, any part of such trade or commerce within the meaning of said act.

(3) If the act of Congress in question should be given a construction which would sustain this bill of complaint, such act would violate the provisions of the Constitution of the United States.

(4) Said bill is multifarious.

(5) There is a misjoinder of causes of action and of persons in said bill, as alleged in said demurrers.

(6) The said bill of complaint and the allegations and charges therein are not sufficiently definite or specific, but are too general and indefinite.

The circuit court overruled the demurrers and ordered a preliminary injunction to issue in accordance with the prayer of the petition, and also ordered the defendants to answer the petition. The defendants did not answer, but elected to stand upon their demurrers. Whereupon the circuit court ordered the petition to be taken pro confesso and entered the following decree, making the preliminary injunction perpetual, to wit:

> And now, upon motion of the said attorney, the court doth order that the preliminary injunction heretofore awarded in this cause, to restrain the said defendants, and each of them, their respective agents and attorneys, and all

other persons acting in their behalf, or in behalf of either of them, or claiming so to act, from entering into, taking part in, or performing any contract, combination, or conspiracy the purpose or effect of which will be, as to trade and commerce in fresh meats between the several States and Territories and the District of Columbia, a restraint of trade in violation of the provisions of the act of Congress approved July 2, 1890, entitled, "An act to protect trade and commerce against unlawful restraints and monopolies," either by directing or requiring their respective agents to refrain from bidding against each other in the purchase of live stock; or collusively and by agreement to refrain from bidding against each other at the sales of live stock; or by combination, conspiracy, or contract raising or lowering prices or fixing uniform prices at which the said meats will be sold, either directly or through their respective agents; or by curtailing the quantity of such meats shipped to such markets and agents; or by establishing and maintaining rules for the giving of credit to dealers in such meats, the effect of which rules will be to restrict competition; or by imposing uniform charges for cartage and delivery of such meats to dealers and consumers, the effect of which will be to restrict competition; or by any other method or device the purpose and effect of which is to restrain commerce as aforesaid; and also from violating the provisions of the act of Congress approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," by combining or

conspiring together, or with each other and others, to monopolize or attempt to monopolize any part of the trade and commerce in fresh meats among the several States and Territories and the District of Columbia by demanding, obtaining, or, with or without the connivance of the officers or agents thereof, or of any of them, receiving from railroad companies or other common carriers transporting such fresh meats in such trade and commerce, either directly or by means of rebates, or by any other device, trans portation of or for such meats, from the points of preparation and production of the same from live stock or elsewhere, to the markets for the sale of the same to dealers and consumers in other States and Territories than those wherein the same are so prepared, or the District of Columbia, at less than the regular rates which may be established or in force on their several lines of transportation, under the provisions in that behalf of the laws of the said United States for the regulation of commerce, be, and the same is hereby, made perpetual.

But nothing herein shall be construed to prohibit the said defendants from agreeing upon charges for cartage and delivery, and other incidents connected with local sales, where such charges are not calculated to have any effect upon competition in the sales and delivery of meats; nor from establishing and maintaining rules for the giving of credit to dealers where such rules in good faith are calculated solely to protect the defendants against dishonest or irresponsible dealers; nor from curtailing the quantity of meats shipped to a given market where

the purpose of such arrangement in good faith is to prevent the overaccumulation of meats as perishable articles in such markets.

Nor shall anything herein contained be construed to restrain or interfere with the action of any single company or firm, by its or their officers or agents (whether such officers or agents are themselves personally made parties defendant hereto or not) acting with respect to its or their own corporate or firm business, property, or affairs.

The defendants then appealed to this court and made the following assignment of errors:

1. The circuit court erred in overruling and in not sustaining the general demurrers of these defendants, respectively, to the said bill of complaint or petition of the United States.

2. The circuit court erred in not holding and ruling that the said bill of complaint or petition does not allege any contract, combination, or conspiracy in restraint of interstate or foreign trade or commerce within the meaning of said act of Congress, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890, and in not sustaining the said respective demurrers on that ground.

3. The circuit court erred in not holding and ruling that said bill of complaint does not allege the acts of defendants monopolizing or attempting to monopolize or combining or conspiring to monopolize any part of said trade or commerce within the meaning of said act, and in

not sustaining said respective demurrers to said bill or petition on that ground.

4. The circuit court erred in not holding and ruling that if the said act of Congress of July 2, 1890, has and is to be given a construction which would make the said supposed acts of the said defendants in the said bill or petition alleged a violation thereof, for which the said defendants would be subject to the penalties, injunctions, or processes by said act prescribed, the said act would and does violate the provisions of the Constitution of the United States, and in not sustaining the said respective demurrers on that ground.

5. The circuit court erred in not holding and ruling that there is in said bill or petition a misjoinder of causes of action and of persons, as alleged in the said demurrers, and in not sustaining the said respective demurrers on that ground.

6. The circuit court erred in not holding and ruling that the said bill of complaint and the allegations and charges therein are not sufficiently definite or specific, but are too general and indefinite to call for or require any answer from the said respective defendants, and in not sustaining the said respective demurrers to said bill or petition upon that ground.

7. The said circuit court did not have jurisdiction to enter the said decree nor to award the said injunction against these defendants.

8. The circuit court erred in not holding and ruling that said bill or petition was multifarious, and in not sustaining the respective demurrers of these defendants thereto upon that ground.

9. The circuit court erred in not holding and ruling that said bill or petition was for several and distinct matters and causes, in many or some of which these respective defendants, or some of them, are not interested or concerned, and in not sustaining the demurrers thereto upon that ground.

10. The circuit court erred in not holding and ruling that the respective matters and causes in the sixth paragraph of said bill or petition, and the matters and causes in the said seventh paragraph of said bill or petition, and the respective matters and causes in the said eighth paragraph of said bill or petition, and the respective matters and causes in the said ninth paragraph of said bill or petition, and the said respective matters and causes in the said tenth paragraph of said bill or petition, and the said matters and causes in the said eleventh paragraph of said bill or petition, were distinct and different and independent and unconnected matters and causes, and not the same matters or causes, and that the same were improperly joined in the said bill or petition; and in not sustaining the said respective demurrers upon that ground.

11. The circuit court erred in not holding that the supposed unlawful combination and conspiracy between the said defendants for directing and requiring their respective purchasing agents at the said several stock yards and markets to refrain from bidding against each other, except perfunctorily and without good faith, in said sixth paragraph of said bill or petition charged; and the supposed unlawful combination and conspiracy among themselves for bidding up,

through their respective purchasing agents, the prices of live stock for a few days at said stock yards and markets, in said seventh paragraph of said bill or petition charged; and the said supposed unlawful combination and conspiracy to raise, lower, and fix prices and to maintain uniform prices at which they will sell fresh meats to dealers and consumers throughout the States and Territories of the United States, and the District of Columbia, and foreign countries, in the said eighth paragraph of said bill or petition charged; and the said supposed unlawful combination and conspiracy to direct and require their respective agents at and near many of the markets for such fresh meats through the said States and Territories and the District of Columbia to arbitrarily make and impose uniform charges for cartage for the delivery, upon making sales to dealers and consumers in those markets, of the meats shipped to them through the said agents by the said defendants, respectively, from their several points of preparation of the same, in the said ninth paragraph of said bill or petition charged; and the said supposed engaging in and continuing of arrangements and agreements with divers officers and agents of common carriers, in the said tenth paragraph of said bill or petition charged, whereby it is therein charged said defendants were to receive, and have received, and will continue to receive, unlawful rates for transportation of live stock and meats; and the said supposed combination and conspiracy of said defendants with each other and with the railroad companies and others

to complainant unknown, to obtain a monopoly of the supply and distribution of fresh meats throughout the United States and its Territories and shipments thereof to foreign countries, in said eleventh paragraph of said bill or petition charged, are, respectively, distinct and different and unconnected and independent supposed combinations, conspiracies, matters, and causes, and that the same are improperly joined in the said bill, and in not sustaining said respective demurrers to said bill or petition on that ground.

12. That said circuit court erred in not sustaining the said respective demurrers to so much of the said bill or petition as seeks discovery of the books, papers, accounts, letters, telegrams, records, and documents of said respective defendants, and in overruling the said respective demurrers. And the court erred in not holding and ruling that the said prayer and portion of said petition last mentioned, seeking discovery as aforesaid, does not contain any showing of probable cause, supported by oath or affirmation, as required by the fourth amendment to the Constitution of the United States, or otherwise comply with said fourth amendment, but violates, and if allowed would violate, the provisions of the fourth amendment to the Constitution of the United States and would violate the provisions of the fifth amendment to the Constitution of the United States.

13. The said circuit court erred in not sustaining the said respective demurrers to so much of the said bill or petition as seeks that these respective defendants may answer or make any

discovery of or as to any matter or cause of complaint therein alleged, and in overruling the same. And the court erred in not holding and ruling that the said prayer and portion of said petition last mentioned, seeking answer or discovery as aforesaid, does not contain any showing of probable cause, supported by oath or affirmation, as required by the fourth amendment to the Constitution of the United States, or otherwise comply with said fourth amendment, but violates, and if allowed would violate, the the provisions of the fourth amendment to the Constitution of the United States and would violate the provisions of the fifth amendment to the Constitution of the United States.

14. The circuit court erred in not sustaining and in overruling the respective demurrers of these defendants to so much of said bill or petition as is contained in the sixth paragraph thereof, and as alleges that said defendants have engaged in and intend to continue in an unlawful combination and conspiracy between themselves for directing and requiring their respective purchasing agents at the said several stock yards and markets where they customarily purchase live stock necessary to the production of meats produced by them, and in said paragraph sixth mentioned, to refrain from bidding against each other except perfunctorily and without good faith, when making purchases of such live stock on behalf of the said defendants, respectively, and by that means inducing and compelling such owners of such live stock to part with the same at prices less than they would receive at such stock yards and markets if such

bidding were competitive as between said purchasing agents, and that defendants have caused and are causing their agents to refrain from bidding accordingly, and have induced and are inducing each other and will, unless restrained by said court, continue in pursuance of such supposed conspiracy, to induce each other to refrain from bidding as aforesaid, which said supposed combination and conspiracy is there alleged to be one in restraint of trade and commerce among the several States and Territories of the said United States and the District of Columbia and with foreign countries.

And the said defendants and appellants, respectively, say that the said circuit court erred in not holding and ruling that the said paragraph sixth does not allege any acts or facts to constitute the violation of said act of Congress, approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," but was and is too general and indefinite to require answer from the said respective defendants; and in not holding and ruling that the said sixth paragraph does not allege any contract, combination, or conspiracy on the part of the respective defendants in restraint of interstate or foreign trade or commerce within the meaning of said act; and does not allege any monopolizing or attempting to monopolize, or any combination or conspiring to monopolize, any part of interstate or foreign trade or commerce by the said defendants, within the meaning of said act; and in not holding and ruling that the supposed contracts or acts alleged and complained of in said sixth

paragraph are not any part of and do not regulate or affect interstate or foreign trade or commerce.

15. The circuit court erred in not sustaining and in overruling the respective demurrers of these defendants to so much of said bill or petition as is contained in the seventh paragraph thereof and as alleges that said defendants have engaged in and intend to continue an unlawful combination and conspiracy among themselves for bidding up, through their respective purchasing agents, the prices of live stock for a few days at a time at the said stock yards and markets, so that the market reports will show prices much higher than the state of the trade will warrant, and thereby inducing owners of such live stock in divers other of the said States and Territories to simultaneously make large shipments of such live stock from such other States and Territories to said stock yards and open markets, instead of shipping the same to more natural and advantageous markets and at more natural and advantageous times in the due and proper course of such trade and business, and by this means and by reason of the resulting large offerings thereof such live stock (and by thereupon refraining from bidding against each other for the same), obtaining such live stock at prices much less than it would bring in the regular way of trade if such combination and conspiracy were not so engaged in and continued; and have been and are now from time to time through their said agents so fraudulently bidding up the prices of such live stock, and will, unless restrained by said court, continue

so to do, and that said combination and conspiracy last aforesaid is one in restraint of trade and commerce among the several States and Territories of said United States and the District of Columbia and with foreign countries.

And the said defendants and appellants, respectively, say that the said circuit court erred in not holding and ruling that the said paragraph seventh does not allege any acts or facts to constitute the violation of said act of Congress, approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," but was and is too general and indefinite to require answer from the said respective defendants; and in not holding and ruling that the said seventh paragraph does not allege any contract, combination, or conspiracy on the part of the respective defendants in restraint of interstate or foreign trade or commerce within the meaning of said act; and does not allege any monopolizing or attempt to monopolize, or any combination or conspiring to monopolize any part of interstate or foreign trade or commerce by the said defendants, within the meaning of said act; and in not holding and ruling that the supposed contracts or acts alleged and complained of in said seventh paragraph are not any part of and do not regulate or affect interstate or foreign trade or commerce.

16. The circuit court erred in not sustaining and in overruling the respective demurrers of of these defendants to so much of said bill or petition as is contained in the eighth paragraph

thereof and as alleges that the said defendants have engaged in and intend to continue an unlawful combination and conspiracy to arbitrarily from time to time raise, lower, and fix prices, and to maintain uniform prices at which they will sell, directly or through their respective agents, such fresh meats to dealers and consumers throughout the said States and Territories and the District of Columbia and foreign countries; and that the arbitrary raising, lowering, fixing, and maintaining such prices, in pursuance of the said combination and conspiracy, is being and is to be effected through the action of divers of their agents and attorneys in secretly holding periodical meetings at some place or places, and there agreeing upon the prices to be adopted by said defendants, respectively, in said trade and commerce, to be enforced by them until at a subsequent meeting the same may be changed, and that said prices are notified by letters and telegrams in plain language and divers codes and ciphers, and they have been and are maintained by defendants by adhering to the same in their sales made directly, and, among other ways, by collusively restricting and curtailing the quantities of such meats shipped by them in such trade and commerce to the markets aforesaid, whenever necessary or conducive to the maintaining of the prices so fixed; by imposing against each other divers penalties for any and all deviations by said defendants, or any of them, from the prices so fixed; by establishing a uniform rule for the giving of credits to dealers throughout the said States and Territories and District of Columbia

and foreign countries, and for the conduct of the business of such dealers, with penalties as between the said defendants for violations thereof; by notifying each other of the delinquencies of the said dealers and keeping what is commonly known as a "black list" of such delinquents and refusing to sell such meats to any of such delinquents; which said supposed combination and conspiracy is there alleged to be one in restraint and monopoly of commerce among the several States and Territories of the said United States and the District of Columbia and with foreign countries.

And the said defendants and appellants, respectively, say that the said circuit court erred in not holding and ruling that the said paragraph eighth does not allege any acts or facts sufficient to constitute the violation of said act of Congress approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," but was and is too general and indefinite to require answer from the said respective defendants; and in not holding and ruling that the said eighth paragraph does not allege any contract, combination, or conspiracy on the part of the respective defendants in restraint of interstate or foreign trade or commerce, within the meaning of said act; and does not allege any monopolizing or attempt to monopolize, or any combination or conspiring to monopolize any part of interstate or foreign trade or commerce by the said defendants, within the meaning of said act; and in not holding and ruling that the supposed contracts or acts alleged and complained of in said

eighth paragraph are not any part of and do not regulate or affect interstate or foreign trade or commerce.

17. The circuit court erred in not sustaining and in overruling the respective demurrers of these defendants to so much of said bill or petition as is contained in the ninth paragraph thereof and as alleges that the said defendants have engaged in and intend to continue an unlawful combination and conspiracy to direct and require their respective agents at and near many of the markets for such fresh meats throughout the said several States and Territories and the District of Columbia to arbitrarily make and impose uniform charges for cartage for the delivery, upon making sales to dealers and consumers in those markets, of the meats shipped to them through the said agents by the said defendants respectively, from their said several points of preparation of the same, when no such charges have been or are customary in such trade and commerce, or would be made but for said supposed combination and conspiracy, thereby increasing the charges for such meats to said dealers and consumers in such markets, and preventing the purchase of the same by those who are unable or unwilling to pay more than the price of the meats themselves without such additional charge; which said supposed combination is there alleged to be in restraint of said trade and commerce aforesaid.

And the said defendants and appellants respectively say that the said circuit court erred in not holding and ruling that the said paragraph ninth does not allege any acts or facts

sufficient to constitute the violation of said act of Congress approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," but was and is too general and indefinite to require answer from the said respective defendants. And in not holding and ruling that the said ninth paragraph does not allege any contract, combination or conspiracy on the part of the respective defendants in restraint of interstate or foreign trade or commerce within the meaning of said act; or any combination or conspiring to monopolize any part of interstate or foreign trade or commerce by the said defendants, within the meaning of said act. And in not holding and ruling that the supposed contracts or acts alleged and complained of in said ninth paragraph are not any part of and do not regulate or affect interstate or foreign trade or commerce.

18. The circuit court erred in not sustaining and in overruling the respective demurrers of these defendants to so much of said bill or petition as is contained in the tenth paragraph thereof and as alleges that the schedule of rates, fares, and charges for the transportation of live stock to the places of its conversion into meats, as alleged in said bill or petition, which have been established and published by the common carriers by railroads, subject to the provisions of the laws of the United States for the regulation of commerce, were and are and will be the only lawful rates for the transportation, as aforesaid, of such articles, and that the defendants intending thereby to monopolize and attempt to monop-

olize the commerce aforesaid and prevent competition therein have all and each engaged in and will continue arrangements and agreements with divers officers and agents of such common carriers, whereby said defendants were to receive and have received and will continue to receive, by means of rebates and other devices, unlawful rates for such transportation much less than the said lawful rates, and were to exclusively enjoy and share such unlawful advantage, to the exclusion of competitors and would-be competitors and the general public, and have accordingly so enjoyed and shared them, and will, unless restrained by the court, continue to do so; and by force of the consequent inability of competitors and would-be competitors to engage or continue in such commerce without ruinous loss, have monopolized and are monopolizing and will continue to monopolize the said commerce, and have attempted and are attempting and will attempt to monopolize such commerce in live stock and fresh meats among the States and Territories and the District of Columbia and with foreign countries; which supposed scheme to monopolize it is there alleged is also a combination and conspiracy in restraint of trade and commerce among the States and Territories and the District of Columbia and with foreign countries.

And the said defendants and appellants respectively say that the said circuit court erred in not holding and ruling that the said paragraph tenth does not allege any acts or facts sufficient to constitute the violation of said act of Congress approved July 2, 1890, entitled "An act

to protect trade and commerce against unlawful restraints and monopolies," but was and is too general and indefinite to require answer from the said respective defendants. And in not holding and ruling that the said tenth paragraph does not allege any contract, combination, or conspiracy on the part of the respective defendants in restraint of interstate or foreign trade or commerce, within the meaning of said act; or any combination or conspiring to monopolize any part of interstate or foreign trade or commerce by the said defendants, within the meaning of said act. And in not holding and ruling that the supposed contracts or acts alleged and complained of in said tenth paragraph are not any part of and do not regulate or affect interstate or foreign trade or commerce.

And the circuit court erred in not holding and ruling that the supposed acts alleged in said tenth paragraph, as therein alleged, are not each the acts of all of the said defendants; but they are, respectively, alleged acts of one or more of the defendants acting separately in making each for itself or himself the alleged arrangements and agreements with common carriers there referred to; and that the said tenth clause and the bill in those allegations is multifarious, and that there is a misjoinder therein of the alleged causes of action of the parties defendant in that behalf. And the circuit court erred in not holding and ruling that the supposed acts of the respective defendants in said tenth clause alleged are not forbidden by the act in question or by any other law, and that either or any of the defendants acting

separately with respect to his or its own business, is not, and within the sanction of the Federal Constitution could not be, forbidden from agreeing for or receiving the rates of transportation referred to in said tenth clause of said bill.

19. The circuit court erred in not sustaining and in overruling the respective demurrers of these defendants to so much of said bill or petition as is contained in the eleventh paragraph thereof, and as alleges that the said defendants now are and for years past have been in combination and conspiracy with each other and with the railroad companies and others to obtain a monopoly of the supply and distribution of fresh meats throughout the United States and its Territories and shipments thereof to foreign countries.

And the said defendants and appellants, respectively, say that the circuit court erred in not holding and ruling that the said paragraph eleventh does not allege any acts or facts sufficient to constitute the violation of said act of Congress approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," but was and is too general and indefinite to require answer from the said respective defendants; and in not holding and ruling that the said eleventh paragraph does not allege any contract, combination, or conspiracy on the part of the respective defendants in restraint of interstate or foreign trade or commerce within the meaning of said act; or any combination or conspiracy to monopolize any part of interstate

or foreign trade or commerce by the said defendants within the meaning of said act; and in not holding and ruling that the supposed contracts or acts alleged and complained of in said eleventh paragraph are not any part of and do not regulate or affect interstate or foreign trade or commerce.

20. The said circuit court erred in rendering and entering its decree in favor of the said complainant and in awarding or issuing any injunction thereon against the said respective defendants, and in decreeing and ordering that the injunction therein mentioned should be made permanent.

21. The circuit court erred in not holding and decreeing in favor of the said respective defendants and in not dismissing said bill or petition.

The questions raised by this very prolix assignment of errors are reducible to four:

(1) Is the petition multifarious?

(2) Does the petition disclose a misjoinder of parties?

(3) Did the circuit court err in not sustaining the demurrers to the bill in its aspect as a bill for discovery?

(4) Do the facts stated in the petition and admitted by the demurrers disclose a combination or conspiracy to restrain or monopolize any part of interstate or foreign commerce?

Consideration of the first, second, and third questions will be deferred until the fourth is answered, as that is the vital question in the case.

There are no questions of fact to be discussed, as the allegations of the petition stand confessed.

THE ARGUMENT.

I.

Do the facts stated in the petition and admitted by the demurrers disclose a combination or conspiracy to restrain or monopolize any part of interstate or foreign commerce?

There are three branches to this question: (*a*) Do the facts show a combination? If so (*b*), does the combination restrain or monopolize trade or commerce? And (*c*), if the facts show a combination to restrain or monopolize trade or commerce, does the combination operate upon and directly affect interstate or foreign trade or commerce?

(*a*) and (*b*) The combination or conspiracy which the Government is seeking to destroy and which it was the aim of the petition in this case to set forth is one between all the principal American producers or packers of fresh meats for the purpose of jointly controlling the market for those products throughout the entire United States so as to maintain uniform prices therefor and destroy competition in the sale thereof to dealers and consumers.

It is not our purpose to resolve the conspiracy into its parts and attempt to show that each step in its formation or each of the means employed to effect its main object is a separate offense. It seems more agreeable to reason and more consistent with the theory on which the petition was framed to treat the conspiracy in the argument as it is in reality, that is, as a unit, as

a single scheme with interdependent parts, each of which has a distinct office to perform toward the attainment of a single end, which is to control and restrain the fresh-meat trade; and then if it is shown that the whole is unlawful so must the parts be.

Viewing the petition from this standpoint, it is a little difficult to see what ground there is for the contention that it does not disclose a combination or conspiracy to restrain trade, as that term has been defined by this court, when it is averred therein and admitted by the defendants that the latter control about 60 per cent of the trade in fresh meats in the United States, and that they have entered into a "combination and conspiracy to arbitrarily, from time to time, raise, lower, and fix prices, and to maintain uniform prices at which they will sell, directly or through their respective agents, such fresh meats to dealers and consumers throughout the said States and Territories, and the District of Columbia and foreign countries; and that the arbitrary raising, lowering, fixing, and maintaining of such prices, in pursuance of the said combination and conspiracy, is being and is to be effected through the action of divers of their agents and attorneys to your petitioner unknown, *in secretly holding periodical meetings* at some place or places to your petitioner unknown, *and there agreeing upon the prices to be adopted by the said defendants*, respectively, in such trade and commerce, to be enforced by them until at a subsequent meeting the same may be changed; which said prices are notified by letters and telegrams in plain

language and divers codes and ciphers; and they have been and are maintained by said defendants by adhering to the same in their sales made directly, and, among other ways, by exclusively restricting and curtailing the quantities of such meats shipped by them in such trade and commerce to the markets aforesaid, whenever necessary or conducive to the maintaining of the prices so fixed; by imposing against each other divers penalties for any and all deviations by the said defendants or any of them from the prices so fixed; by establishing a uniform rule for the giving of credits to dealers throughout the said States and Territories and District of Columbia and foreign countries, and for the conduct of the business of such dealers, with penalties as between the said defendants for violations thereof; by notifying each other of the delinquencies of the said dealers, and keeping what is commonly known as a 'black list' of such delinquents, and refusing to sell such meats to any of such delinquents;" and by requiring "their respective agents at and near many of the markets for such fresh meats throughout the said several States and Territories and the District of Columbia to arbitrarily make and impose uniform charges for cartage for the delivery, upon making sales to dealers and consumers in those markets, of the meats shipped to them through the said agents by the said defendants."

Here is the definite and specific allegation that the defendants, who are independent and, under normal conditions, competing producers, have combined to-

gether to fix and maintain uniform prices for their meats, and that to effect that object they cause their agents and attorneys to hold periodical meetings and there agree upon such uniform prices, which the defendants, respectively, adhere to. Then follows a circumstantial account of the methods agreed upon to maintain uniformity in prices and guard against competition, secret or open, on the part of any member of the combination. This is the basic allegation of the petition. It is a full, complete statement of the ultimate facts constituting the principal combination or conspiracy, and the means agreed upon to enforce its object, and we are unable to see how anything could be added to the averment without entering upon a recital of evidence, which is not only not required but would be repugnant to the most elementary principles of pleading. The allegation, ex vi termini, shows that it is not open to the objection pointed out In re Greene, 52 Fed. 104, and relied upon by counsel here, namely, the objection of "following simply the language of the act" and affirming that the defendants "'engaged in a combination,"' or "'made contracts in restraint of such trade or commerce,"' or "'monopolized,"' or "'attempted to monopolize' the same."

Other paragraphs of the petition show the steps and means by which the object of the principal combination—the uniform control and regulation of the sales and prices of fresh meats throughout the United States—is more certainly accomplished, the combination itself strengthened and supported, and its grasp upon the

fresh meat industry of the nation made firmer and completer, and hence more powerful and oppressive. Thus paragraphs 6 and 7 state how the defendants have, through their combination, reached back and shut out competition in the purchase of live stock, from which the fresh meats are produced, and appropriated to themselves a part of the cattle raisers' legitimate profit, by directing and requiring their purchasing agents, at the markets where the live stock is customarily purchased, to refrain from bidding against each other when making purchases, and to bid up the prices of live stock for a few days at a time so as to induce large shipments, and then desist from bidding, thereby causing a large supply and no demand, and consequently low prices. And in paragraph 10 it is alleged, and the allegation stands admitted, that in furtherance of the aforesaid combination and scheme to monopolize, the defendants have engaged in arrangements and agreements with various common carriers for rebates and concessions in transportation not enjoyed by their competitors, by means of which they have been able to undersell their competitors until they crushed them and monopolized the trade.

We shall not stop to argue that the combination thus set forth is in restraint of trade, for if in the entire field of the law concerning monopolies and restraints of trade there is a single proposition to which all courts now yield assent, it is that a combination, conspiracy, or agreement between independent manufacturers or producers of a necessary of life to fix and maintain

uniform prices for their products, or otherwise to suppress competition with each other, is an unlawful restraint upon trade (*United States* v. *E. C. Knight & Co.*, 156 U. S., 1, 16; *United States* v. *Trans-Missouri Freight Association*, 166 U. S., 290; *United States* v. *Joint Traffic Association*, 171 U. S., 505; *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S., 211; *Northern Securities Co.* v. *United States*, 193 U. S., 197; *Chesapeake & Ohio Fuel Co.* v. *United States*, 115 Fed. Rep., 610; judgments of Lord Bramwell and Lord Hannen in *Mogul S. S. Co.* v. *McGregor*, L. R. App. Cas. (1892), 46, 58; *Morris Run Coal Co.* v. *Barclay Coal Co.*, 68 Pa. St., 155, 173; *Nester et al.* v. *Continental Brewing Co.*, 161 Pa. St., 473; *Salt Co.* v. *Guthrie*, 35 Ohio St., 166; *People* v. *Sheldon*, 139 N. Y., 251; *Cummings* v. *Union Blue Stone Co.*, 164 N. Y., 405; *Trenton Potteries Co.* v. *Olyphant*, 58 N. J. Eq., 507; *Craft* v. *McConoughby*, 79 Ill., 346; Noyes on Intercorporate Relations, p. 513, note 1, where the cases are collected); and necessarily the means agreed upon to effect the unlawful object of the combination or conspiracy are inseparable parts of the combination or conspiracy itself, and along with it fall within the condemnation of the law.

(*c*) The third and remaining branch of the question is, Does the combination or conspiracy in controversy operate upon interstate or foreign commerce, or is its operation confined to commerce carried on wholly within State lines?

The contention advanced by opposing counsel is that the sales of live stock to the defendants and the sales by them of the prepared meats, set out in para-

graphs 6, 7, and 8 of the petition, are not interstate, but intrastate, sales, and therefore, conceding that the defendants have combined and conspired to suppress competition in those sales, the combination does not operate upon interstate commerce.

We shall attempt to show (1) that whether those particular sales are interstate transactions or not, the combination charged in the petition was designed to, and does, by maintaining uniform prices for fresh meats, suppress competition between the defendants, who are independent producers, in an area covering more States than one, and therefore operates upon and restrains interstate commerce; and (2) that the sales in question are not exclusively intrastate transactions, as is contended, but are within the body of interstate commerce.

1. Interstate commerce or commerce *among* the several States, according to Chief Justice Marshall's definition in *Gibbons* v. *Ogden*, is "*commerce which concerns more States than one*" (9 Wheat. 1, 194), and a combination or agreement between independent manufacturers or producers to fix and control prices and suppress competition, as has already been shown (supra, p. 36), is a restraint upon commerce. "* * * in *all* the prior cases in this court the anti-trust act has been construed as forbidding any combination which by its necessary operation destroys or restricts free competition among those engaged in interstate commerce; in other words, that *to destroy or restrict free competition in interstate commerce was to restrain such commerce.*"

(*Northern Securities Co.* v. *United States*, 193 U. S., 197, 337.) Now, if interstate commerce is commerce which concerns more States than one, and if a combination of independent producers to suppress competition between its members is a restraint upon commerce, it must follow that a combination of independent producers to fix and control prices and suppress competition between each other in an area covering more States than one is in restraint of interstate commerce.

Does the petition in this case disclose such a combination? We have previously endeavored to show, by the admitted allegations of the petition, that the defendants have combined to fix and control the prices of fresh meats and suppress competition with each other in the sale thereof as well as in the purchase of live stock. The only part of the question left unanswered, therefore, is, Does the combination operate in a territory embracing more States than one? Does it fix prices and suppress competition in a territory embracing more States than one? The allegations of the petition, which are to be taken as true, furnish a conclusive answer to this inquiry. Paragraph 1 states that the defendants are engaged in buying live stock at points named in the States of Illinois, Nebraska, Iowa, Missouri, and Minnesota, and in converting it into fresh meats at plants in those and other States. Paragraph 2 states that they sell and ship portions of the meats so prepared to dealers and consumers in other States and Territories, and paragraph 3 states that they ship portions of such meats to their agents in other States

and Territories to be sold to dealers and consumers. Paragraph 4 states that the defendants control about 60 per cent of the trade in fresh meats in the United States. Paragraph 6 avers that "in order to restrain competition among themselves as to the purchase of live stock necessary to the production of the meats produced by them [they] have engaged in and intend to continue an unlawful combination and conspiracy between themselves for directing and requiring their respective purchasing agents at the said several stock yards and open and competitive markets where they customarily purchase such live stock, to wit: *Kansas City and St. Joseph, Mo.; Omaha, Nebr.; Sioux City, Iowa; St. Paul, Minn.; East St. Louis and Chicago, Ill.* * * * to refrain from bidding against each other, except perfunctorily and without good faith, when making purchases of such live stock. * * *" And paragraph eight states that "in order to restrain and destroy competition among themselves * * * [defendants] have engaged in and intend to continue an unlawful combination and conspiracy to arbitrarily, from time to time, raise, lower, and fix prices, and to maintain uniform prices at which they will sell, directly or through their respective agents, such fresh meats to dealers and consumers *throughout the said States and Territories and the District of Columbia and foreign countries;* and that the arbitrary raising, lowering, fixing, and maintaining of such prices, in pursuance of the said combination and conspiracy, is being and is to be effected through the action of divers of their agents and attorneys

* * * in secretly holding periodical meetings * * * and there agreeing upon the prices to be adopted by the said defendants."

Here are the undisputed averments, in terms as specific and unmistakable as it is possible to make them, that the defendants have combined and agreed to destroy competition among themselves by maintaining and charging uniform prices for fresh meats "*throughout the said States and Territories and the District of Columbia and foreign countries;*" and that they have combined and agreed to refrain from competing with each other in the purchase of live stock at markets located in half a dozen different States, naming them.

It is impossible to say with even a color of reason that these facts, which can not be denied, do not show a combination between the defendants to suppress competition between themselves in an area embracing more States than one; and if the preceding argument is sound such a combination is a restraint upon interstate commerce, and it is immaterial to inquire whether the particular purchases and sales made by the defendants are, technically, interstate or intrastate transactions.

There is nothing unreasonable or novel in the conclusion that a combination may restrain interstate commerce, although the individual transactions of its members might, standing alone and viewed separate and apart from the purpose and necessary effect of the whole combination, be intrastate in character. In *Montague & Co.* v. *Lowry* (193 U. S., 38), the decision turned on the following rule of an association of deal-

ers in tile in the State of California and manufacturers in other States:

> SEC. 7. No dealer and active member of this association shall purchase, directly or indirectly, any tile or fireplace fixtures from any manufacturer or resident or traveling agent of any manufacturer not a member of this association, *neither shall they sell or dispose of, directly or indirectly, any unset tile for less than list prices to any person or persons not a member of this association, under penalty of expulsion from the association.*

And counsel contended (see brief for plaintiff in error, p. 13) that—

> It is important to recur again to the character of the dealers who are members of the association, as being local dealers, doing business in San Francisco or within a radius of 200 miles thereof. The point of this is, that the transactions in unset tile at list prices under section 7, supra, are local transactions, intrastate transactions, in no respect taking on the quality of interstate commerce.
>
> Now, we make two points: First, that the transactions in unset tile at list prices being purely local, are not within the purview of the act of Congress, and to this end we cite the late case of the *Addyston Pipe & Steel Co.* v. *United States* (175 U. S., 211).

To which this court replied, not denying the premises but very emphatically denying the conclusion:

> It is urged that the sale of unset tile provided for in the seventh section of the by-laws

> is a transaction wholly within the State of California, and is not in any event a violation of the act of Congress, which applies only to commerce between the States. The provision as to this sale is but a part of the agreement, and it is so united with the rest as to be incapable of separation without at the same time altering the general purpose of the agreement. The whole agreement is to be construed as one piece, in which the manufacturers are parties as well as the San Francisco dealers, and the refusal to sell on the part of the manufacturers is connected with and a part of the scheme which includes the enhancement of the price of the unset tile by the San Francisco dealers. *The whole thing is so bound together that when looked at as a whole the sale of unset tile ceases to be a mere transaction in the State of California and becomes a part of a purpose which, when carried out, amounts to and is a contract or combination in restraint of interstate trade or commerce.*

It was also recognized in *Addyston Pipe & Steel Co.* v. *United States* (175 U. S., 211, 240), that the character of a combination—that is, whether or not it is interstate in its operation—is decided, not by the nature of the particular transactions of its individual members, but by the extent of the territory in which it operates—in which it controls prices and sales and suppresses competition. If that territory embraces more States than one the combination restrains interstate commerce. Said this court:

> While no particular contract regarding the furnishing of pipe and the price for which it should

> be furnished was in the contemplation of the parties to the combination at the time of its formation, yet it was their intention, as it was the purpose of the combination, to directly and by means of such combination to increase the price for which all contracts for the delivery of pipe within the territory above described should be made, and the latter result was to be achieved by abolishing all competition between the parties to the combination. The direct and immediate result of the combination was, therefore, necessarily a restraint upon interstate commerce in respect of articles manufactured by any of the parties to it to be transported beyond the State in which they were made. The defendants, by reason of this combination and agreement, could only send their goods out of the State in which they were manufactured, for sale and delivery in another State, upon the terms and pursuant to the provisions of such combination. As pertinently asked by the court below, was not this a direct restraint upon interstate commerce in those goods?

If it were true that a combination can not be said to restrain interstate commerce except where the individual transactions of its members, standing alone and viewed apart from the extent and purpose of the combination, are interstate in character, and accepting as sound appellant's contention (to be examined presently) that where a packing company in Illinois ships meats to its agent in New York and the agent sells them there, the sale is an intrastate, not an interstate, transaction, the way would be opened wide for the easy evasion of the existing anti-trust law as well as all other

laws that Congress might level against combinations and monopolies in restraint of interstate commerce; for independent and competing manufacturers or producers wishing to combine need only establish selling agencies in the various States and agree upon a uniform scale of prices to be charged in sales by their respective agents in each State, and such sales not being interstate sales, the combination would not affect interstate commerce.

2. But while it is true, as we believe and have attempted to show, that the determination of the question whether a combination in restraint of trade operates upon interstate or only intrastate commerce does not depend upon whether the individual transactions of its members, if standing alone and viewed separate and apart from the purpose and necessary effect of the whole combination, are interstate or intrastate in character, and that the petition here discloses a combination which operates upon *interstate* commerce, whatever may be the character of the individual transactions of its several members, it is in addition true in this case that the individual transactions of the members of the combination do fall within the jurisdiction conferred upon Congress by the commerce clause of the Constitution.

These transactions consist of (*a*) the defendants' purchases of live stock (petition, pars. 1 and 6); (*b*) the sales and shipments of fresh meats made directly by the defendants to dealers and consumers in the several States (petition, pars. 2 and 8); and (*c*) the sales of

fresh meats to dealers and consumers in the several States by agents of the defendants located in those States (petition, pars. 3 and 8).

(*a*) From all over the stock-raising section, embracing many different States, cattle, sheep, and hogs are habitually shipped to the great live-stock markets at Chicago, Omaha, Sioux City, St. Joseph, Kansas City, East St. Louis, and St. Paul for sale, as set out in the petition, to those, the defendants chief among them, engaged in the business of converting live stock into fresh meats for human consumption. The shipments are made with the express and sole purpose of sale as soon as market conditions will permit, and the sales are made while the cattle yet remain in first hands, that is, in the hands of the owners or their agents, and in the ordinary form or condition in which cattle are shipped from one country or State to another, which is analogous to the form or condition of the original package in the case of merchandise. (*Austin* v. *Tennessee*, 179 U. S., 343, 359.)

The cattle are not dealt with in a commercial way from the time of their arrival until their sale to the defendants and others, but are simply fed and cared for. No act is done with reference to them that would cause them to become mixed with the general mass of local property. Now, it may be that a distinction should be made between what may be called an interstate sale proper and in the full sense of the term—that is, a sale between persons negotiating and dealing from two or more different States, and a sale, at its destination and while it still remains in the original state or package,

of an article of commerce sent from another State. But so far as the result in this instance is concerned it is a distinction without a difference. If the sales of live stock set forth in the petition do not fall within the first of these classes they certainly fall within the second, and that brings them within the protection of the Federal power over commerce and therefore within the protection of the anti-trust act; for, as this court has decided, the right to transport articles of commerce from one State to another includes the right of the owner or consignee to sell them in the latter free from any burden or restraint that the States might attempt to impose (*Brown* v. *Maryland*, 12 Wheat., 419; *Bowman* v. *Chicago and Northwestern Railway Co.*, 125 U.S., 465; *Leisy* v. *Hardin*, 135 U. S., 100; *Rhodes* v. *Iowa*, 170 U. S., 412), and, a fortiori, free from any burden or restraint that a combination of individuals might attempt to impose (In re Debs, 158 U. S., 564, 581).

In the case of *Hopkins* v. *United States*, 171 U. S., 578, 590, this court said that "the selling of an article at its destination, which has been brought from another State, * * * may be regarded as an interstate sale and one which the importer was entitled to make" although "the services of the individual employed at the place where the article is sold are not so connected with the subject sold as to make them a portion of interstate commerce."

(*b*) The second paragraph of the petition states that the defendants "are * * * engaged in the business of selling * * * fresh meats, at the several places where they are so prepared, to dealers and con-

sumers in divers States and Territories * * * other than those wherein the said meats are so prepared and so sold as aforesaid, * * * and shipping the same meats, when so sold, from the said places of their preparation * * * to such dealers and consumers pursuant to such sales.

It is perfectly plain from the context that the pleader intended by this language to describe sales of fresh meat owned and held in one State to dealers and consumers located in and dealing from other States and the consequent shipment of the meat to the purchasers, and the court below understood the words to express that intention (Record, p. 30). It is safe to say that even counsel for the defendants will concede that sales of that description are interstate sales. But it is contended that the phrase, "at the places where so prepared," limits the description to sales begun and completed at those places, and therefore wholly within State lines. Even if it could not be shown that those words were inserted for another and entirely different purpose, the unreasonableness of that construction would still be apparent. The intention was to describe sales made by the defendants directly to dealers and consumers throughout the United States as contradistinguished from sales made through the defendants' agents, and set forth in the succeeding paragraph; and the idea is absurd that in transacting these sales the purchasers, except perhaps in a few isolated instances, travel all the way from their respective domiciles to Chicago, Kansas City, Omaha, or other places where

the defendants have plants, when they can just as well deal from the places where they reside and do business. Therefore, even if the language were susceptible of two constructions, an elementary canon requires that that one be adopted which leads to a sensible rather than to an absurd conclusion. But what the phrase in question really means is that at the time the sales are made the meats are at the places where they were prepared, and the object in emphasizing that point was to bring out more markedly the diverse situs of the seller and the subject-matter of the sale, on the one hand, and the buyer, on the other, as is shown by the phrase immediately following, to wit, "to dealers and consumers in States *other than where so prepared and sold.*" At any rate, however, paragraph 2 merely contains matter of description and inducement, and must be read in conjunction with the stating part of the petition, which alleges, inter alia, that "in order to restrain and destroy competition among themselves" the defendants have engaged in a "combination and conspiracy to arbitrarily from time to time raise, lower, and fix prices, and to maintain uniform prices at which they will *sell, directly or through their respective agents, such fresh meats to dealers and consumers throughout the said States and Territories and the District of Columbia and foreign countries.*"

If, then, the sales made directly by the defendants to dealers and consumers throughout the United States (petition, pars. 2 and 8) are interstate sales, and if the

decisions of this court have settled, as we think has been shown, that a combination to control and suppress competition in such sales is a combination in restraint of interstate commerce, the petition in this case, having shown that much, can not in any event be dismissed, even should it be held to have failed in all other respects.

(*c*) Paragraph 3 of the petition states that the defendants are engaged in shipping fresh meats from their plants in certain States to their respective agents at and near the principal markets in other States and Territories for sale by such agents to dealers and consumers in those States and Territories. Upon the question whether or not the sales made by these agents under the circumstances set forth are within the body of interstate commerce, there is nothing to add to the cogent argument of the circuit judge, who said in his opinion (Record, pp. 30, 31):

> Unquestionably it is interstate commerce when purchasers from other States buy directly from the defendants and have the meats shipped to them by the vendors. The *situs* of such a transaction, both as to initiatory intercourse and as to transportation in furtherance of the exchange, includes a State other than the one from which defendants deal.
>
> I think the same is true of meat sent to agents and sold from their stores. The transaction in such case, in reality, is between the purchaser and the agent's principal. The agents represent the principal at the place where the exchange takes place, but the transaction as a commercial

entity includes the principal, and includes him as dealing from his place of business. Indeed, such privity exists between the principal and the transaction that he could, at the instant, as a citizen of another State, sue upon the transaction in the Federal courts; nor have I any question that if the conditions of this case were reversed, so that defendants were invoking the shelter instead of seeking to escape the obligations of the commerce clause, Federal law would be found equal to the protection asked.

I need not dwell on the contention of defendants that the fresh meats in the hands of the agents are subject to ordinary State taxation, or upon the cases cited in this connection. It is enough to say that because a thing can be taxed by the State, it does not follow that it lies outside the body of interstate commerce; for commerce, interstate as well as domestic, is subject to the police and taxing power of the State so long as the exercise of such power does not interfere with the National Government's exclusive right of regulation. (*Addyston Pipe and Steel Co.* v. *United States*, 175 U. S., 235; *Austin* v. *Tennessee*, 179 U. S., 349; Prentice & Egan on the Commerce Clause of the Constitution, p. 27.) Nor shall I differentiate the *Knight* case, the *Hopkins* case, and other cases urged upon me as applicable to the case under consideration. A study of these cases will show that they are not in conflict with the views already expressed.

II AND III.

Is the petition multifarious, or does it disclose a misjoinder of parties?

Acting on an intimation from the circuit judge counsel for the Government did not discuss these questions in the court below. The objections rest wholly on the hypothesis that the acts set forth in paragraphs 6, 7, 8, 9, and 10 of the petition are separate, distinct, and unconnected transactions. But this hypothesis is unwarranted and incorrect. The acts referred to have been shown in the course of the argument to be closely connected. The bare reading of the petition is, in fact, enough to satisfy the mind that they are all steps or means in the accomplishment of a single aim, namely, the control of the market for fresh meats throughout the United States, and that being the case they should be dealt with collectively as interdependent parts of a single scheme, each part having a distinct office to fill in the attainment of the common end. If, then, as thus clearly appears, the hypothesis upon which these objections are based is an inaccurate one, they fall to the ground.

Numerous courts have held that the test for multifariousness "is whether the bill, fairly construed, *shows a single object and seeks to enforce one general and common right*" (14 Encyl. Pl. and Pr., 198, and the many cases there cited); and certainly the petition in this case responds unqualifiedly to that test.

In Bates on Federal Equity Procedure, Vol. I, secs. 135 and 195, there is a very satisfactory discussion of the subject of multifariousness, based on the decisions

of this and other courts there cited. In section 195 the author states his conclusion that—

> If separate, distinct, and different matters, having no connection with each other, are joined in one bill against several defendants, a part of whom have no interest in or connection with some of the distinct matters for which suit is brought, so that such defendants are put to the unnecessary trouble and expense of answering and litigating matters in the bill in which they are not interested, and which are not so connected with the matters in which they are interested as to render it proper for the convenient administration of justice to litigate and dispose of the whole in one suit, the bill will be demurrable for multifariousness; but if the object of the suit be single, but different persons have separate interests in distinct questions which arise out of the single object, or if the bill presents a common point of litigation, in which all of the parties are interested, and the decision of which will affect the whole subject-matter, and will settle the rights of all the parties to the suit, although the defendants have separate interests in distinct questions arising out of the suit, the bill will not be demurrable for multifariousness.

IV.

Did the circuit court err in not sustaining the demurrers to the bill in its aspect as a bill for discovery?

That it did not is clear upon several grounds:

1. The demurrers to the discovery assigned no cause of demurrer except the general one that the "petitioner

hath not in and by said bill or petition in that behalf made or stated such a case as doth or ought to entitle them [it] to any such discovery." This, of course, is the usual formula for the general demurrer and the same form of words was used in stating the ground of the demurrer to the relief. Now, as the discovery in this case is merely incidental to the relief, and as the defendants assigned no special cause of demurrer to the discovery in addition to the general objection, that the bill was without equity, assigned as ground for demurrer to both relief and discovery, and as the circuit court had decided that the bill was not without equity, but did state a case for relief, the objection to the discovery fell with that decision and hence was properly overruled, without reliance upon the long-established principle that a single demurrer to a whole bill can not be overruled in part and sustained in part but must be overruled in its entirety if any part of the bill can be sustained.

The claim that to enforce the discovery prayed for would expose the defendants to unreasonable searches and seizures and force them to furnish evidence that might incriminate them and subject them to penalties and forfeitures, in violation of the fourth and fifth amendments to the Constitution, was not made upon the record until after the circuit court had rendered its opinion and entered its decree. It was brought into the case for the first time in the argument of defendants' counsel. That the circuit court did not consider that the question had been presented to it in such a way as

to demand an answer is most cogently demonstrated by the circumstance that it mentions it neither in its statement of the grounds of demurrer nor in its opinion.

2. The demurrers in this case are demurrers to the whole bill. They are none the less demurrers to the whole bill because after stating objections to the bill as a whole they assign the same objections to particular parts of the bill. In *Livingston* v. *Story* (9 Pet., 632, 654), presently to be examined, a demurrer directed to "the matters contained in said bill" and also to "*any or either of such matters*," was dealt with as, and deemed, a demurrer to the whole bill; in fact, there was no dispute upon the point.

Now, if it be so that the demurrers in this case are demurrers to the whole bill, the circuit court, finding that the demurrer to the relief should be overruled, had no other course except to overrule the entire demurrer even though it were of opinion that the demurrer to the discovery were well taken, since the well-settled rule of equity pleading is that a demurrer to a whole bill can not be sustained as to part of the bill and overruled as to part, but must be overruled as to the whole if any part of the bill is good and entitles the complainant to any relief. Fletcher, Eq. Pl., secs. 203, 204; Story, Eq. Pl. (10th ed.), secs. 443 and 444; *Livingston* v. *Story*, 9 Pet., 632, 654, 658; *Parker* v. *Simpson*, 62 N. E. (Mass.), 401; *Metler's Admns.* v. *Metler*, 18 N. J. Eq., 270, 273. When the defendants leveled their demurrers at the relief as well as the discovery, instead of answering as to the relief and demurring as to the

discovery, they did so at their peril; that is, at the risk of losing on both points if they failed as to the relief. *Livingston* v. *Story*, supra.

In Fletcher on Equity Pleading (secs. 203 and 204) it is said:

> A demurrer to the whole bill must be overruled if the bill, taken altogether, entitles the complainant to some kind of relief. * * * Thus where a bill seeks discovery and relief and is sustainable for relief a demurrer to the whole bill can not be sustained, though the complainant is not entitled to the discovery.
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> * * * * *
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> A demurrer can not be good in part and bad in part. If any part of a bill is good and entitles complainant to either relief or discovery, a demurrer to the whole bill can not be sustained.

In *Livingston* v. *Story*, supra, the defendant demurred to the whole bill, and for cause showed that the complainant had not made such a case as entitles him, in a court of equity, to any discovery touching the matters contained in the bill, or any or either of such matters, nor to entitle the complainant to any relief touching any of the matters complained of (p. 654 of the report). In overruling the demurrer this court said:

> And if any part of the bill is good and entitles the complainant either to relief or discovery, a demurrer to the whole bill can not be sustained. It is an established and universal rule of pleading in chancery that a defendant may meet a complainant's bill by several modes

of defense. He may demur, answer, and plead to different parts of a bill. *So that if a bill for discovery and relief contains proper matter for the one and not for the other, the defendant should answer the proper and demur to the improper matter. But if he demurs to the whole bill the demurrer must be overruled.* 5 Johns. Chan., 186; 1 Johns. Ca., 433.

In *Parker* v. *Simpson*, supra, there were several demurrers and several grounds of demurrer, as here, and, as here, the demurrers were directed at the discovery as well as the relief. In its opinion the supreme judicial court of Massachusetts said:

> It would serve no useful purpose to go over, seriatim, the grounds of the various demurrers. We shall here notice only those which are insisted on in the defendant's brief, and we shall consider them topically in the order there suggested. The others call for no remark, except to say that they do not seem to us sound.
>
> 1. As to discovery. The defendant insists that the plaintiffs are not entitled to the discovery sought in the first prayer, that the defendant disclose under oath a true statement and account of all the real and personal property transferred and delivered to him as aforesaid, and of the rents, proceeds, and income thereof, and of all property purchased with funds so received, and the income and proceeds thereof. But we do not think that he is in a position to avail himself of this contention, *even if there is anything in it.* The bill is for relief [that is, that was its primary aim], and not for discovery.

> The part of the demurrer which refers to this matter is to the whole bill. *The bill is sustainable for relief. Therefore the demurrer, being to the whole, can not be sustained.* Story, Eq. Pl., sec. 312.

The case of *Metler's Admns.* v. *Metler*, supra, is virtually parallel, at all points, with that at bar. The bill there was for relief and discovery. "The defendants demur[red] to the bill generally, and allege[d] as a special ground of demurrer to the discovery, that the defendants, being husband and wife, are not either of them bound to make any answer or discovery that may affect the claims or rights of the other" (p. 272). In overruling the demurrer the chancellor said (pp. 273 and 274):

> As the complainants are entitled, upon the case made in their bill, to have this note delivered up to be canceled, the demurrer can not be sustained to the relief. It is bad in part. But it is a well-established rule in equity when a demurrer is too extensive, or bad in part, that it must be wholly overruled. Story's Eq. Pl., secs. 443, 448, 692; Daniell's Chan. Prac. (3d Amer. ed.), 568 and 608.
>
> This is a demurrer to the whole bill, *and includes both the relief and discovery.* The causes of demurrer assigned, which together must be coextensive with the demurrer, are in part to the relief and in part to the discovery. And then by that rule, *although the demurrer might be good to the discovery*, yet, being bad in part, it must be wholly overruled. * * *

This court, in Miller *v.* Ford (Saxt., 365), adopted the modern English rule, that when a plaintiff on a bill praying relief is not entitled to relief he is not entitled to discovery. But this doubtful exception does not affect the converse proposition, *that where, on demurrer to the whole bill, the complainant is held entitled to the relief the demurrer can not be sustained as to the discovery, even if a demurrer to the discovery alone would be good.*

* * * * *

The general rule is that in all cases where the complainant is entitled to relief he is entitled to discovery. But to this there are exceptions, as in cases where the discovery would subject the defendant to indictment, forfeiture, or penalty, when it would be a breach of professional confidence, or would be of matters irrelevant and immaterial to the relief sought; in all which and similar cases a demurrer may be taken to the *discovery alone.* (1 Daniell's Chan. Prac., 571, 588–607.)

3. In an act of Congress approved February 25, 1903 (32 Stats., 903), there is the following provision:

That for the enforcement of the provisions of the act entitled "An act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, and all acts amendatory thereof or supplemental thereto, and of the act entitled "An act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety, and all acts amendatory thereof

> or supplemental thereto, and sections seventy-three, seventy-four, seventy-five, and seventy-six of the act entitled "An act to reduce taxation, to provide revenue for the Government, and other purposes," approved August twenty-seventh, eighteen hundred and ninety-four, the sum of five hundred thousand dollars, *to be immediately available*, is hereby appropriated, out of any money in the Treasury not heretofore appropriated, to be expended under the direction of the Attorney-General in the employment of special counsel and agents of the Department of Justice to conduct proceedings, suits, and prosecutions under said acts in the courts of the United States: *Provided, That no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under said acts: Provided further*, That no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying.

The underscored portion of the above enactment is exactly similar to the act of Congress of February 11, 1893 (27 Stat. 443), applicable to proceedings under the acts to regulate commerce, in construing which in the case of *Interstate Commerce Commission* v. *Baird*, 194 U. S., 25, 44, this court said:

> It is considered in the answers filed in the circuit court that to require the production of these contracts would be to compel the witnesses to furnish evidence against themselves which

might result in forfeiture of estate in violation of the fifth amendment to the Constitution; [and] would subject the parties to unreasonable searches and seizures of their papers contrary to the fourth amendment, * * *

* * * As to the constitutional objection based upon the fifth amendment, the act as amended February 11, 1893, expressly extends immunity from prosecution or forfeiture of estate because of testimony given in pursuance of the requirements of the law. The full consideration of the subject and the decision of this court in *Brown* v. *Walker*, 161 U. S., 591, renders further consideration of this objection unnecessary.

The origin and interpretation of the fourth amendment to the Constitution, securing immunity from unreasonable searches and seizures, was fully discussed by Mr. Justice Bradley in the leading case of *Boyd* v. *United States*, 116 U. S. 616. In that opinion the learned justice points out the analogy between the fourth and fifth amendments, and the object of both to protect a citizen from compulsory testimony against himself, which may result in his punishment or the forfeiture of his estate, or the seizure of his papers by force, or their compulsory production by process for the like purpose. * * *

As we have seen, the statute protects the witness from such use of the testimony given as will result in his punishment for crime or the forfeiture of his estate. Testimony given under such circumstances presents scarcely a suggestion of an unreasonable search or seizure * * *

Now, counsel for defendants has shown (brief filed in lower court, p. 69) that there is no difference between obtaining evidence from a defendant while he is on the witness stand and obtaining it from him through his answer to a bill in equity, and upon this point I concur in his argument.

In *Brown* v. *Walker*, supra, it was aptly said that—

> If, as was justly observed in the opinion of the court below, witnesses standing in Brown's position were at liberty to set up an immunity from testifying, the enforcement of the interstate commerce law or other analogous acts, wherein it is for the interest of both parties to conceal their misdoings, would become impossible, since it is only from the mouths of those having knowledge of the inhibited contracts that the facts can be ascertained. While the constitutional provision in question is justly regarded as one of the most valuable prerogatives of the citizen, its object is fully accomplished by the statutory immunity * * * (p. 610).

It follows from the principles announced in the above-mentioned decisions of this court that since the passage of the act of February 25, 1903 (supra, p. 59), witnesses and defendants in proceedings under the anti-trust act may not object to giving testimony or producing documentary evidence on the constitutional ground that the testimony or evidence sought might expose them to unreasonable searches or seizures, or incriminate them, or subject them to penalties and forfeitures. And it was not until after the passage of the act of February 25, 1903, that the defendants in this

case were under any rule or requirement to answer the Government's petition. The thirty-fourth equity rule of this court provides that when a demurrer to a bill is overruled the defendant shall be assigned to answer the next succeeding rule day or at some other period consistent with justice and the rights of the defendant. He is thus under no obligation to answer until he is assigned to do so. Now in this case the order of the court below overruling the demurrers and assigning the defendants to answer on or before April 21, 1903, was not entered until April 4, 1903, several months after the immunity act was passed. During the whole period of time, therefore, in which the defendants were under any obligation or requirement whatever to answer they had the protection of the act of February 25, 1903, and that alone is a conclusive answer to their contention that the circuit court erred in not sustaining their demurrers to the discovery.

In conclusion, it may be remarked that judges have differed as to the validity of aggregations of capital effected by some form of organic union between several smaller and competing corporations, and economists are far from agreeing that such aggregations, within limitations, are hurtful. So too, associations of manufacturers to regulate competition within a restricted area have not always been condemned by courts and have sometimes been approved by publicists. But has a responsible voice yet been heard to justify, legally or economically, a conspiracy or agreement between nearly all the producers of a commodity necessary to

life by which the confederates acquire absolute control and dominion over the production, sale, and distribution of that commodity throughout the entire territory of a nation, with the power, at will, to raise prices to the consumer of the finished product and lower prices to the producer of the raw material? Yet such is that now at the bar of this court. That there is a conspiracy to control the market of the nation for fresh meats, that it does control it, and that its control is merciless and oppressive, are facts known of all men. The broad question here is, Does the Government's petition, with its statements of fact standing unchallenged, discover that conspiracy to the court? We submit that it does and that the decree of the circuit court should in all things be affirmed.

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